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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 515

ANNIS WYCHE AND ROBERT C. THORPE,
Petitioners,

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable the Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

Petitioners, Annis Wyche and Robert C. Thorpe, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

Opinion Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been reported, but appears in R. 50-52.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 23, 1951. On December 19, 1951, Chief Justice Vinson extended the time for filing Petition for Writ of Certiorari to and including January 8, 1952. The jurisdiction of this Court is invoked under Section 1254 of Title 28, U. S. Code.

Questions Presented

1. Whether a search warrant is valid and could properly and legally issue when it is based on an affidavit only of police officers alleging they had *information* that the premises to be searched were for turning in of numbers; and that the officers observed some people enter said premises prior to making their affidavit, some of whom had paper bags which the officers *believed* contained numbers slips; and the further alleged *belief* by the officers that the premises were a "numbers turn-in place."

2. Whether the search and seizure made by officers is unlawful and the evidence should be suppressed which is obtained under authority of an alleged search warrant issued only on an affidavit of police officers alleging information, belief, and only conclusions of law and fact that certain premises were believed to be a "numbers turn-in place."

3. Whether the Circuit Court erred in considering that the attack on the validity of the search warrant issued on the affidavit only of the officers was not a proper motion to suppress the evidence attacking the competency of the evidence seized thereunder because no written motion to suppress the evidence had been filed prior to trial, in view of the fact that the District Court considered the question whether the alleged search warrant was validly issued, on its merits, and

ruled that the affidavit of the officers only was sufficient basis for issuance of said search warrant.

4. Whether the Circuit Court erred in affirming the ruling of the District Court that the affidavit only of the police officers stating information, beliefs, and conclusions of law and fact was sufficient basis for the issuance of the search warrant, and in overruling motions to suppress and objections to the admission of evidence seized under authority of the alleged search warrant.

5. Whether mere presence of a person in premises searched legally authorizes police officers without warrant for him, to search him, seize money from his person, and subsequently arrest him, regardless of the legality of the alleged search warrant for the premises, where it appears he was one of fourteen or more persons in said premises at the time said alleged search warrant was executed and was arrested only because of his mere presence and because the search of him disclosed his possession of money only; and whether it is proper to admit in evidence the property so seized from him.

6. Whether the entry of a person into premises some appreciable period of time after premises were searched under authority of an alleged search warrant, which had already been executed, authorizes legally the arresting officers, without warrant for him, to search him, seize from his person certain property, and subsequently arrest him because of what the search of him disclosed; and whether it is proper to admit in evidence the property so seized from him.

7. Whether the Circuit Court erred in affirming the ruling of the District Court refusing to direct a verdict of acquittal for petitioner Thorpe where the evidence showed that the petitioner Thorpe was merely present in premises searched; that he had a paper bag; that when asked, he told officers it

contained cement; that upon examination by the officers without warrant for him, disclosing that the bag contained money, they arrested him; that upon being questioned, he further told the arresting officers he had nothing to do with the premises or with what may have been occurring therein; that he had been in the premises a couple of minutes; that although more than 14 persons were present in said premises when the officers entered, 10 of them were released after a search disclosed they had no money or property on their persons.

8. Whether it is error, in a trial of four defendants on a single indictment charging them jointly as principles, for the Court to instruct the jury *that the relationship of the defendants to each other in the eyes of the law is that of accomplices,* particularly when the ultimate issue for the jury to determine on the question of guilt or innocence under the indictment is *whether or not they are accomplices.*

9. Whether it is error for the Court, in a trial of four defendants on a single indictment charging them jointly as principles with promoting a lottery and possession of lottery slips, to fail to mention and define 'joint enterprise' in his charge to the jury, that being an essential question of law involved and an essential element of the offense charged —the only theory upon which they were, or could be jointly indicted and convicted.

10. Whether the charge to the jury on accomplices, referred to in Questions 8 and 9, and the failure to instruct on joint enterprise, *supra*—an essential question of law involved and an essential element of the offense—constitute 'plain error and defects affecting substantial rights,' although they were not brought to the attention of the trial court.

11. Whether the Circuit Court erred in holding that petitioners are not allowed to raise the question of plain error

affecting substantial rights for the first time upon appeal, since they did not comply with the provisions of Rule 30 of the Federal Rules of Criminal Procedure.

12. Whether the Circuit Court erred in further holding that the trial court's charge to the jury on accomplices and the trial court's failure to define joint enterprise did not constitute plain error affecting substantial rights.

Statutes Involved

The statutes (Sections 22-1501, 1502, D. C. Code, 1940 Ed.) which the appellants have been convicted of violating read as follows:

Section 22-1501:

"If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery, or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at

such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, Sec. 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72 sec. 1).

Section 22-1502:

"If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both. (Apr. 5, 1938, 52 Stat. 198, ch. 72, Sec. 2).

Statement

Petitioners were indicted jointly with Helen D. Reed and Wilhelmina Porter on August 14, 1950, in a two-count indictment, alleging violations of Sections 22-1501 and 1502 of the D. C. Code (1940 Ed.). (R. 1)

The first count alleged that the four defendants on or about May 19, 1950, within the District of Columbia, were concerned as owners, agents, and clerks, and in other ways in managing, carrying on, and promoting a lottery known as the numbers game.

The second count alleged that the four defendants, on or about May 19, 1950, within the District of Columbia, knowingly had in their possession certain tickets, certificates, bills, tokens, papers, and writings used and to be used, and adapted, devised, and designed for the purpose of playing, carrying on, and conducting a lottery known as the numbers game. The petitioners were arraigned and entered pleas of not guilty to the indictment.

The trial of petitioners and the other two defendants indicted with them was commenced and completed before a jury in the United States District Court on November 6, 1950. The jury returned a verdict of guilty as to each petitioner, and the other two defendants on each count, on November 6, 1950, and they were sentenced on January 5, 1951, as follows:

Annis Wyche, from six to eighteen months on the first count, and six months on the second count, said sentences to run concurrently; Robert C. Thorpe, nine months to thirty-six months on the first count, and six months on the second count, said sentences to run concurrently. (Helen D. Reed and Wilhelmina Porter were each sentenced to a term of from six to eighteen months; the executions of their sentences were suspended and they were placed on probation. They did not appeal.)

Present counsel did not represent petitioners or the other defendants at the trial.

While trial counsel for all the defendants should have more properly filed a written motion for the return of property and to suppress evidence before trial, counsel raised the proposition orally prior to the trial (R. 2, 3), but the Court ruled at that time as follows:

> "I think your objection, Mr. Hughes, would go to the sufficiency of the Government's case after the evidence is in, rather than to any objection as a matter of form for pleading at the present time. I think your objection must wait until the Government puts in their case, and we will have to evaluate it on the question of whether there is a prima facie case." (R. 2, 3)

Unquestionably, counsel for accused was moving to suppress the evidence on the ground that there was not probable cause for believing the existence of the grounds on which the search warrant was issued.

The alleged search warrant (R. 44, 45) states that it was issued and based on two affidavits, one by officers Bean and Pizzati, and the other by one Irma Young. Irma Young was not produced as a witness by the prosecution, and apparently there was no opportunity afforded to the defendants prior to trial to interrogate her in regard to her affidavit, for the purpose of showing there was not probable cause for believing the existence of grounds on which the search warrant was issued.

To attempt to prove its case, the prosecution called as its first witness one Benjamin F. Bean, who testified that he was a member of the Metropolitan Police Department, and that on May 19, 1950, he went to premises 39 Massachusetts Avenue, N. W., together with Officer Pizzati; that he had in his possession the alleged U. S. Commissioner's search warrant referred to.

After Officer Bean was sworn and prior to his giving any testimony regarding the arrests, searches, and seizures, counsel for petitioners and the other defendants again orally moved to suppress the evidence obtained under authority of the alleged search warrant (R. 6, 26) (apparently on the ground there was not probable cause for believing the existence of the grounds on which the warrant was issued) but was overruled by the Court. Counsel contended (R. 6, 7) that the affidavit of officers Bean and Pizzati was insufficient upon which to issue the search warrant. Counsel for the accused contended in effect that he did not file a written motion to suppress prior to the trial because he was not aware of the grounds for the motion until such time as he actually made the oral motions immediately before and after the commencement of the trial, and that he had no prior knowledge that Irma Young would not be produced by the prosecution to testify.

Although no written motion to suppress the evidence had been filed prior to trial, the trial court again considered the sufficiency of the affidavit upon which the search warrant was issued and the searches and seizures made under authority of said warrant, on the merits; and further, considered specifically the searches of and seizures from petitioners on the merits.[1] (R. 26, 28).

Note 1, supra, also clearly indicates that objection was made to the searches, seizures, and arrests of appellants and the admission in evidence against them of what said illegal searches and seizures disclosed, regardless of the legality of the search warrant, and the Court sustained these searches on the merits.

Officer Bean then testified that when he first entered the premises, he observed a desk, adding machines, and about

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[1] "*Mr. Hughes:* I object, general objection with respect to the warrant. I made my objection earlier.

The Court: Your objection is as to the sufficiency of the warrant?

Mr. Hughes: That's right. And furthermore, that there was no justification or reason or excuse for search of Wyche, the removal of anything from his person, money or envelopes which had to be investigated or perused to ascertain whether or not they contained anything of an incriminating nature. Further, there was no justification nor excuse nor rhyme or reason for the removal from Thorpe's possession any money that he had at the time of his arrest. I object not only to the arrest of the defendant, but I object to the introduction in evidence of anything taken from either Wyche or Thorpe, if Your Honor please.

The Court: Anything further?

Mrs. Stiles: No, Your Honor.

The Court: The Court will overrule the objection and admit the Exhibits 6 through 15.

(Government Exhibits Nos. 6 through 15, heretofore identified, were received in evidence.)

The Court: Mr. Hughes?

Mr. Hughes: That's all, sir.

The Court: Will you approach the bench?

(The following discussion took place at the bench.)

The Court: I don't want to say it in the hearing of the jury, but I think that when a person comes into a place that's operating as a booking

fourteen people in the room in which the arrests, searches, and seizures were made; that the first person he observed was the petitioner Thorpe, who was standing near the door with a paper bag in his hand (R. 8), and upon inquiry as to what he had in the bag, Thorpe answered "Cement"; that Officer Pizzati, who accompanied Bean, took the bag from Thorpe, looked into it, and set the bag on the desk near the door; that the bag contained money; that thereafter Thorpe was placed under arrest; that Wilhelmina Porter, one of the other defendants, was just getting up from the stool and the adding machine at a desk in the center of the room; that Helen Reed came in from next door a few minutes later; that about five minutes after Helen Reed entered, the defendant Wyche came into the room from outside the building; that there were two large desks

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agency for numbers where all of these other implements are concerned, that the officers are justified in searching the person who comes in there.

I didn't want to say that in front of the jury and give the impression that the Court concludes that these people were operating a lottery and so on, but it is my feeling, and I express it to you in order that you will have my views on the record, that if a person walks into a place like this at a time when a raid is in process, I believe the officers were within their legal rights in making a search of that person.

I do want to say also, in order that you may have my views for any action that you want to take, that insofar as the search warrant is concerned, the officers in their supporting affidavit say that they observed these premises from 1:00 p.m. to 2:20 p.m., May 16, 1950. They observed sixteen colored men and four colored women enter through the front door carrying packages, and so on, and coming out without the packages. They continued their observations on the 17th and 18th in support of information that the place was being used for the turning in of numbers. On both days they observed between eighteen colored men and women enter the premises with paper bags and leave after a few minutes without anything in their hands. Most of the people were the same as observed entering the above premises the two previous days.

I think that is sufficient justification in affidavit form for a search warrant without reference to the last paragraph, which says they have further substantiation made by the affidavit of Irma Young and so forth.

• • •

I think upon the basis of their observations for three days that there was sufficient to justify."

covered with linoleum in the room, and on the desks were two adding machines, some alleged numbers slips and money, envelopes, telephone, and two wooden trays; that a search was made of the premises and some more alleged numbers slips and money were found in the desk drawers. That the search warrant called for Helen Reed and a search of her premises (R. 21). Over objection of counsel for appellants, he stated that although he had no warrant for Wyche, he searched him and found certain articles and money in Wyche's possession which were introduced in evidence against Wyche. That he arrested Wyche after searching him and after finding certain slips and money in his possession.

This witness further testified that he further questioned Thorpe after searching him and then placing him under arrest as to what Thorpe had to do with the premises and the alleged lottery, and Thorpe replied he did not have anything to do with it; that he asked Thorpe why he was in the premises, and Thorpe answered that he had come in a couple of minutes before to pick up some money, and that he would have been gone in another two minutes; that the alleged slips seized from Wyche were taken from his side coat pocket; that they seized other evidence from the desk in the center of the room.

The witness further testified on cross-examination that Thorpe had $600 in the paper bag when he was arrested, and that Thorpe had stated that he came by to get some money, and that $600 would be the amount paid off on a dollar bet; that it was necessary for the witness to open the envelopes seized from Wyche in order to ascertain whether or not they contained any alleged numbers slips; that they released all the persons who were found in the premises who had no property or money in their possession (R. 10). That nothing but money was found in the possession of Thorpe; that Helen Reed was asked if there was anyone in

the room that she rented the premises to, and she replied in the negative, stating that she subrented the premises to a man uptown.

The prosecution called Officer Delmo D. Pizzati as its second and last witness, who testified that he was a member of the Metropolitan Police Department and accompanied Officer Bean to the premises searched; that Officer Bean had in his possession the alleged search warrant heretofore described; that upon entering the room, he observed the petitioner Thorpe with a paper bag in his hand, and also observed defendant Wilhelmina Porter; that Wilhelmina Porter was seated at a table behind an adding machine, and that there were about a dozen other persons in the room at the time; that some minutes later, the petitioner Annis Wyche came to the rear door of the room and entered the premises; that he had some conversation with the petitioner Thorpe; that he asked Thorpe what was in the bag and was told that the bag contained cement; that the witness examined the contents of the bag possessed by Thorpe, and it contained $600 in money; that Thorpe stated that he had just come in to pick up some money and he was leaving.

Counsel for all the defendants and the prosecution then stipulated that the testimony of this witness with reference to Government's exhibits 6 through 15 would be corroborative of testimony given by the witness Bean. After the stipulation, the Government rested its case.

Counsel for the defendants then renewed the motion to suppress *all* the evidence seized under authority of the alleged search warrant (apparently on the ground that there was not probable cause for believing the existence of the grounds on which the search warrant was issued); and then counsel particularly objected to the searches, seizures, and arrests of petitioners Wyche and Thorpe, and the admission in evidence against them of what said illegal searches and

seizures disclosed, regardless of the legality of the search (R. 26, 27).

These motions and objections were overruled and all the seizures were admitted in evidence. The reasons given by the Court for overruling the motions and objections of counsel are set forth in Note 1 supra.

Counsel then made a motion for a Judgment of acquittal on behalf of both petitioners; for Thorpe on the grounds that the only evidence against him was the fact that he was in the premises with $600 in a paper bag; and for Wyche because Wyche was searched and found in possession of slips when he entered the premises after the raid was executed. The Court overruled the motion for judgment of acquittal for Thorpe, and gave the following reasons (R. 31):

> "I think on the basis of the testimony of Officer Bean, which was corroborated by the testimony of the second officer, Pizzati, that Thorpe was in the premises, that he had the paper bag, told the officers first that it was a bag of cement; that they later said that the bag was examined and found to contain approximately $600 in coins and bills, that is sufficient to go to the jury in the case."

The prosecutor argued to the jury that Thorpe should be convicted on the following theory: (R. 33)

> "The defendant Thorpe, ladies and gentlemen, the government takes the position that this defendant Thorpe was also aiding and operating this lottery, that he was found there when the officers arrived, standing nearest the door with a paper bag in his hands containing approximately $600, that when asked what the bag contained, he replied, cement; and later when the officers opened the bag and asked him what he was doing there, he said well, he would have gone if they had just been a little bit later, that he just come in to get some money."

After arguments by counsel for both sides, the Court charged the jury in a positive manner that the relationship of the petitioners and the other defendants to each other was that of accomplices.[2] (R. 39) The Court then read the lottery statutes involved to the jury, instructed them regarding the burden of proof, but said nothing regarding the presumption of innocence that surrounds all defendants.[3] (R. 41) The Court then instructed the jury regarding the failure of the defendants to testify on their own behalf [4] (R. 42), but failed to instruct that defendants did not have to produce any evidence in their behalf.

The Court then instructed the jury (R. 42) that they could find the defendants either guilty or not guilty on each count,[5] but failed to instruct them that they could find one or more guilty or not guilty. The defendants were treated as a unit. The Court then submitted the case to the jury with the instruction that they could find the defendants guilty or not guilty. (R. 42)

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[2] "I should first of all explain to you that the relationship of these people to each other in the eyes of the law is that of accomplices. I say that because the law provides that regardless of the degree of guilt which exists between any defendants, if they all operate together in a mutual undertaking or a joint enterprise, each one is equally guilty with the others for the conduct of any one."

[3] The burden of proof is not on the defendants to prove themselves innocent. The Government must prove them guilty beyond a reasonable doubt.

[4] You are further instructed that no inference of guilt arises against these defendants because of their failure to testify as witness in their own behalf.

As I have explained to you before, the law provides that no defendant is required to take the stand and testify. Obviously if any inference could be drawn from this failure to take the stand, there would be no purpose in telling the defendant that he does not have to take the stand. Consequently, I caution you that no inference of guilt arises against these defendants because of their failure to testify as witnesses in their own behalf.

[5] The indictment in this case is returned in two counts. Upon the first count you may find the defendants either guilty or not guilty. Upon the second count you may find the defendants either guilty or not guilty. It is essential, of course, that all twelve of you agree upon your verdict.

The jury returned a verdict of guilty as to all defendants on both counts. Thereafter a motion for a new trial was filed and overruled. The trial court imposed sentences as heretofore shown, and the judgments were affirmed by the Circuit Court.

Reasons for Granting the Writ

I

A. The decision of the Circuit court of appeals fails to give proper effect to applicable decisions of this Court, and is in conflict with its own and other Circuit courts of appeals decisions, and involves questions of substance relating to the construction and application of the United States Constitution in that the said decision holds in effect that a search warrant may legally and validly issue which is based on an affidavit containing mere information, belief, and conclusions of affiants; and in affirming the failure of the District Court to suppress evidence seized under authority of such alleged search warrant; and further, in affirming the ruling of the trial court that the searches of, seizures from, and subsequent arrests of petitioners were legal, and what was seized from them was properly admitted in evidence, when it appeared that one of the petitioners was one of fourteen persons present in premises searched under the alleged search warrant, and said premises were not his; and this said petitioner was one of four of said fourteen subsequently arrested, indicted and convicted as a joint offender, apparently because a search of him disclosed he possessed $600 in cash, failed to possess lottery slips, was merely present in the premises, stated to arresting officers he came in to get some money and had nothing to do with the premises or any offenses which may have been committed therein; and where it appeared that the other petitioner was not present in the premises at the time of the execution of the

alleged search warrant, but came into said premises more than 5 minutes subsequent to the execution of said search warrant; and where it further appears that the arresting officers did not testify they had seen, known, or known of the petitioners, or prior thereto been in the premises searched, nor did they have a warrant of arrest or any information regarding the petitioners or other defendants.

B. This Court has never directly passed on the legality of a search, seizure, and subsequent arrest without a warrant for him, of a person who enters premises not his some time after a search warrant has been executed for the search of said premises and while officers are still present in said premises; and where it further appears that the officers did not know him nor have any prior information concerning him. This is a question of substance relating to the construction and application of the Constitution of the United States, which has not been, but should be settled by this Court.

a. The motion to suppress the evidence seized under authority of the alleged search warrant should have been sustained and the property and things seized thereunder should not have been admitted in evidence against petitioners over their objections.

The pertinent part of Rule 41 (e), Federal Rules of Criminal Procedure, pertaining to a motion to suppress evidence, insofar as it relates to this case, reads as follows:

> "* * * The motion shall be made before trial or hearing, unless opportunity therefor did not exist, or the defendant was not aware of the grounds for the motion, but the Court in its discretion may entertain the motion at the trial or hearing."

The affidavit of Delmo V. Pizzati and Benjamin F. Bean fails to set forth probable cause for the issuance of the search warrant and was not legally sufficient to show prob-

able cause for believing the existence of the grounds on which the warrant was issued.

The oral motions to suppress the evidence were made before and after the jury was sworn, apparently on the ground that there was not probable cause for believing the existence of the grounds on which the warrant was issued, but these motions were overruled by the Court (R. 2, 3, 6, 26, 28, Note 1, supra), the District Court considered the motions to suppress the evidence *on the merits* and overruled same.

Irma Young, who made an affidavit which was alleged in the search warrant to be part of the basis for its issuance, was not called by the prosecution in the trial of the case; was not present in Court or accounted for, and counsel for accused was, therefore, without opportunity to examine her in regard to her affidavit for the purpose of showing there was not probable cause for believing the existence of grounds on which the search warrant was issued. *The trial court ruled that the affidavit of Pizzati and Bean alone* (R. 27, 28) *was sufficient basis for issuance of the alleged search warrant and apparently decided that because of her absence the affidavit of Irma Young was not part of the case and was not considered in deciding the motion to suppress.* The language of the Court in this regard is shown in R. 27, 28, and is set forth in Note 1 (supra).

As the affidavit of Pizzati and Bean is the only affidavit that can be and was considered as to the existence of probable cause for the issuance of the alleged search warrant, because it was the only one considered by the Court, the warrant is void for failure to observe the requirement that the affidavit sworn to before the Commissioner must establish the grounds for issuing the search warrant, and must establish probable cause for believing that the grounds for the application exist. This affidavit, which was held by the

trial court to be sufficient upon which the alleged search warrant could properly be issued, does not show the affiants' personal knowledge of the ground on which the warrant was issued. It is based on information, belief, and conclusions of the affiants, and is, therefore, insufficient.

The guaranties of the Fourth and Fifth amendments to the Constitution are to be liberally construed to prevent impairment of the protection extended. *Boyd* v. *U. S.*, 116, U. S. 616, 635; *Gouled* v. *U. S.*, 255 U. S. 298, 304; *Go-Bart Company* v. *U. S.*, 282 U. S. 344, 357; *Grau* v. *U. S.*, 287 U. S. 124. The proceedings by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendment to the Constitution, and this together with the legislation on regulating the process should be liberally construed in favor of the individual. *Boyd* v. *U. S., supra; Marron* v. *U. S.*, 275 U. S. 192; *U. S.* v. *Lefkowitz,* 285 U. S. 452; *Sgro* v. *U. S.*, 287 U. S. 210.

In *Byars* v. *U. S.*, 273 U. S. 28, 29, this Court in deciding that an affidavit similar to that of Pizzati and Bean was insufficient for issuance of a search warrant, stated as follows:

> "The information upon which the search warrant was issued states only that affiant 'has good reason to believe and does believe the defendant has in his possession' such intoxicating liquors, instruments, and materials. The warrant is clearly bad if tested by the Fourth Amendment and the laws of the United States."

To the same effect, see *Schencks* v. *U. S.*, 55 App. D. C. 84, 2 Fed. 185; see also *Go-Bart Importing Company* v. *U. S., supra; Grau* v. *U. S., supra.*

There is no evidence that either Bean of Pizzati had ever been in the premises prior to the time of search under the authority of the alleged search warrant, or that they knew any of the defendants. There is nothing in their affidavit to

show any alleged facts except that they observed a number of people enter the premises on three days. Tested by the Fourth Amendment and its construction in this regard by all the Federal authorities, the ruling of the trial court that the search warrant properly issued on the affidavit of officers Pizzati and Bean alone, was error, and the evidence seized under authority of the alleged search warrant should have been suppressed for use as evidence. This affidavit simply states that the affiants had information and believed that a numbers game was being operated, and goes no farther than to allege conclusions of law or fact on which the right to search or seize is based. It was, therefore, insufficient to support a search warrant, and the search warrant issued on such affidavit is invalid.

Although the search warrant was for Helen D. Reed and for her premises, even if it is assumed that petitioners were her guests, the denial of the Motion to Suppress evidence seized under authority of said alleged search warrant was fatal error that was substantially prejudicial to the petitioners as well. *McDonald* v. *U. S.*, 335 U. S. 451, 463.

Two paragraphs of the decision of the Circuit Court in overruling contention of petitioners that the trial court erred in refusing to grant the motion to suppress all evidence seized under the search warrant are contradictory and are as follows:

> "Counsel has argued that the Court below erred in refusing to suppress evidence presented by the government. This contention finds no support in the record. * * * The record discloses that counsel not only disclaimed any desire to enter a motion to suppress the evidence, but he also gave specific reasons for his disclaimer. He stated that a motion to suppress evidence would require a claim to a property right in the things seized, and asserted he was making no such claim * * *"

> "The *record does disclose* that counsel below sought to *attack the validity of the search warrant* under which the officers entered the premises and appellants now contend that the Court erred in not declaring the warrant invalid. By personal observation, *the officers who conducted the search and made the arrests carefully checked the information they had received from the informant.* The facts which they ascertained were *clearly* sufficient to justify a discreet and prudent man in concluding that the premises were being used in connection with the numbers game. Brinegar v. United States, 338 U. S. 160." (Italics supplied).

The Court's opinion on this point fails to consider that the *only method of attacking the validity of a search warrant, including lack of sufficient probable cause for its issuance, is by a motion to suppress the evidence.* The prosecution contended in the Court below that the objection to the testimony of what was observed and seized under the alleged search warrant was in the nature of a motion to quash the search warrant. Apparently trial counsel for appellants labored under the mistaken legal theory that a written motion to suppress the evidence in advance of trial would have to be predicated upon a claim of ownership of the *property seized,* and this was the reason for his failure to file a written motion. However, by making timely objections (R. 2, 3, 6, 26, 28) to the validity of the alleged search warrant, to what was observed and seized under the alleged authority of same, the objection to the admission in evidence of the things seized under its authority, the consideration by the trial court of these objections upon the merits of the validity of the search warrant, and the trial court's holding that the affidavit of the officers alone was sufficient upon which to issue said warrant, the trial counsel legally and effectively moved to suppress the evidence seized under authority of said warrant.

There can be no doubt that the trial court considered the attack on the validity of the search warrant as having been properly and timely made, even though no written motion to suppress the evidence was filed in advance of trial, by its consideration of the objections made by trial counsel on the merits as to whether the search warrant was legally and validly issued on the affidavit only of the police officers.

The decision of the Circuit court fails to give effect to *U. S.* v. *DiRe*, 332 U. S. 581, on this proposition. This Court in that case said:

> "The Circuit Court of Appeals, Second Circuit, considered that any question as to the timeliness of his objection to this evidence was eliminated by its disposition on its merits by the District Court * * *"

In this regard, the Second Circuit, speaking through Judge Learned Hand in the same case, argued below, *U. S.* v. *DiRe*, 159 F. 2d 818, stated as follows:

> "The arrest was on April 14, 1944; the indictment was found and filed on June 23, and the case came on for trial on August 8; meanwhile, DiRe had not moved to prevent the seized coupons from being used as evidence upon his trial. However, when the prosecution offered them in evidence, his attorney objected to their admission on the ground that the search had been unlawful; and the Court excused the jury while the question was discussed upon the merits. * * *"

On Page 820, the Circuit court said:

> "The last sentence of Rule 41(e) is in this regard merely a restatement of the law as it was. It would be a parody on justice now to hold that, although the judge was wrong in the decision which he did make, nevertheless, since he might have refused to make it at all, DiRe may not complain of the error."

It is obvious, therefore, that the trial Court considered the attack on the validity of the alleged search warrant on

the merits as a motion to suppress the evidence, and as the affidavit of the officers only was insufficient upon which to issue a valid search warrant, the warrant should have been declared invalid, and all evidence seized under its alleged authority should be suppressed.

The Circuit Court states that trial counsel properly attacked the validity of the search warrant and affirms the lower court in sustaining its validity on the affidavit (R. 46) of the police officers only, on the theory that *the officers by personal observation* checked the information they had received from informant, and that *their affidavit alone* was sufficient grounds upon which to issue the alleged search warrant, and cites *Brinegar* v. *U. S.*, 338 U. S. 160 as authority for so holding.

The affidavit of the police officers clearly shows that other than seeing some unidentified persons enter the premises with paper bags and some with bulging pockets, it contains only the *information and belief* of the affiants; and is insufficient basis for the issuance of a valid search warrant.

That part of the *Brinegar* case, *supra*, cited as authority by the Circuit Court for ruling the search warrant valid, is pure dictum; but even this dictum does not hold differently from *Byars* v. *U. S.*, and *Schencks* v. *U. S.*, *supra*. As hearsay reports, statements upon information and belief, and conclusions contained in the affidavit must be disregarded, the competent evidentiary facts contained therein were insufficient upon which to issue a legal search warrant.

b. The motions to suppress evidence seized from petitioners, regardless of the legality of the alleged search warrant, should have been sustained and the property and things seized from them should not have been admitted in evidence over their objections.

(1) The mere presence of petitioner Thorpe in the premises for which the alleged search warrant was issued did

not legally justify the search of, seizure from, and subsequent arrest of him, and this seizure should have been suppressed for use as evidence.

The testimony offered by the prosecution showed that the petitioner Thorpe was one of approximately 14 or more persons who were in the premises for which the search warrant was issued, said search warrant being issued for Helen D. Reed and to search her premises.

The officers had no search warrant or warrant of arrest for Thorpe, but saw him standing near the door with a bag in his hand, and upon inquiry as to what he had in the bag, Thorpe answers "Cement"; that the officers took the bag from him, looked into it, and discovered that the bag contained $600, and then placed Thorpe under arrest. They further testified that they searched all the persons found in the premises, but released those who had no property or money in their possession. (R. 8, 10.) After being arrested, Thorpe allegedly stated upon questioning by the officers that he had nothing to do with the premises, but only came in to pick up some money.

It is contended that the alleged search warrant for Helen D. Reed and to search her premises did not justify the search of, and seizure from Thorpe of money, and his subsequent arrest merely because he was at the place where a crime allegedly had been committed. In this regard, attention is called to the case of *U. S.* v. *DiRe, supra*, in which this Court, in deciding that the existence of reasonable cause for searching an automobile believed to be carrying contraband does not warrant the search of an occupant thereof, although the contraband sought is of a character which might be concealed on the person, said:

> "The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on

his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for searching guests in a car for which one had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only, it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit? . . . We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."

It should be noted from the evidence that Thorpe was placed under arrest after the search of and seizure from him of his money; and that if he had not possessed money, he would not have been arrested, indicted, and tried in this case. The record fails to show any legal justification for the search of, seizure from, and subsequent arrest of Thorpe and the seizure from him should have been suppressed for use as evidence.

(2) The entry of Annis Wyche into another person's residence for which the search warrant had issued, some minutes after the execution of said alleged warrant, did not legally justify the search of, seizure from, and subsequent arrest of him.

The evidence shows that Wyche entered the premises for which the search warrant was issued more than five minutes after the execution of said warrant, and the officers had no search warrant or warrant of arrest for Wyche.

The Circuit Court affirmed the trial court's ruling which held (Note 1, *supra*) that when a person comes into a place

that is allegedly used as a numbers agency, the officers are justified in searching the entrant. It is contended that the DiRe Case (*supra*) is sufficient authority for the proposition that the search of, seizure from, and subsequent arrest of Wyche were illegal and in violation of his constitutional rights, and that said seizure from him should have been suppressed for use as evidence against him. Mere entrance into an establishment which allegedly had been used as a place for law violation can never justify the search of, seizure from, and subsequent arrest of the entrant without a search warrant or warrant of arrest for him. There was no evidence that the officers had any prior knowledge of Wyche or Thorpe.

As the alleged search warrant could not legally issue on the officers' affidavit, it is contended that the admission in evidence of what was seized under its alleged authority was illegally admitted in evidence by the trial Court.

As the search of, and seizure from the appellants, regardless of the legality of the search warrant, was illegal, it is contended that the admission in evidence of what was seized personally from them was also improperly admitted in evidence by the trial Court. It is not material that the search of Wyche was successful in revealing evidence of an alleged violation of law.

A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; nor can it be tolerated under the constitutional system that evidence of crime discovered by an officer in making a search without lawful warrant may be used against a victim of unlawful search where a timely challenge has been interposed. *Byars* v. *U. S.* (*supra*); *Weeks* v. *U. S.*, 232 U. S. 383, 393; *Gouled v. U. S.* (*supra*); *Amos* v. *U. S.*, 255 U. S. 313; *Silverthorne Lumber Company* v. *U. S.*, 251 U. S. 385, 391; *Agnello* v. *U. S.*, 269 U. S. 20. To the same effect, see *Nueslein* v. *D. C.*, 73 App. D. C. 85, 115 F. (2d) 690; *McDonald* v. *U. S.* (*supra*).

II

The court of appeals has decided a question of general importance relating to the construction and effect of a statute of the United States, the Federal Rules of Criminal Procedure, and such decision is contrary to applicable decisions of this Court, other circuit courts of appeals, and prior decisions of its own, in holding that petitioners are not allowed to raise for the first time on appeal the question of plain error and defects affecting substantial rights because they did not comply with provisions of Rule 30 of the Federal Rules of Criminal Procedure; and in further holding (1) that there existed no plain error affecting substantial rights in the trial court's charge to the jury, wherein that Court charged the jury that the relationship of the petitioners and two other defendants who were indicted and tried as joint offenders, was "to each other in the eyes of the law that of accomplices," when the question of whether they were accomplices was the ultimate issue for the jury to determine under the indictment charging them with being joint offenders; and in further holding (2) there existed no plain error affecting substantial rights from the failure of the trial court to define "joint enterprise"—which was an essential question of law involved in the case and an essential element of the offense, and was, and of necessity legally had to be, the only theory upon which defendants could properly be indicted and convicted as alleged joint offenders.

There existed plain error affecting substantial rights in the trial Court's charge to the jury announcing the law of the case and in failing to properly and sufficiently instruct the jury on the essential questions of law involved in the case and essential elements of the offense; and the Circuit Court erred in holding plain error did not exist in the trial Court's charge to the jury.

Petitioners and two other defendants were jointly indicted in the same counts in one indictment. The theory of the prosecution's case was, and of necessity legally had to be, that the petitioners and the other defendants engaged in a single joint venture to violate sections 22-1501, 1502 of the D. C. Code, and contemplated that the petitioners and the other defendants acted together in the commission of the same offenses, and that the said offenses were carried on by all of them in pursuance of a common intent and in furtherance of a previously formed design in which all of their minds concurred.

To prove the petitioners and the other defendants, or any of them guilty, it was incumbent upon the prosecution to prove oneness of intent and oneness of offense to make them joint offenders, *Paylor* v. *U. S.*, 42 App. D. C. 428; and before a conviction could properly be had in this case, it was not sufficient that the petitioners or other defendants, or any of them, might separately have violated sections 22-1501, 1502 of the D. C. Code, but the jury would have to further believe beyond a reasonable doubt that petitioners and the other defendants violated those sections in pursuance of a common intent and in furtherance of a previously formed common design. Although no evidence was presented by the petitioners, there was vigorous disagreement as to whether the evidence against each was sufficient to convict under the indictment.

The mere presence of the petitioners at the scene of the alleged offenses is not evidence of their guilt of the offenses for which they were indicted and convicted.

Attention is again called to the testimony of the officers (who had an alleged search warrant for Helen Reed and her premises) that when they entered the said premises, Thorpe was one of approximately 14 or more persons who were in the premises, and that Wyche came into the premises a few minutes after execution of the alleged search

warrant. They further testified that they searched all the persons found in the premises, but released those who had no property or money in their possession. (R 8, 10.)

It is obvious from the testimony that Thorpe was prosecuted as an aider and abettor merely because he was present and had money in his possession; and that Wyche was prosecuted merely because he had certain property and money in his possession at the time he entered the premises. It is submitted that what was seized from petitioners in no manner connected them as aiders or abettors of the alleged offenses committed by Reed or Porter.

The trial Court overruled the motion for Judgment of Acquittal for Thorpe because he was merely in the premises and had money in his possession and gave the following reasons in overruling said motion: (R. 31.)

> "I think on the basis of the testimony of Officer Bean which was corroborated by the testimony of the second officer, Pizzati, that Thorpe was in the premises, that he had the paper bag, told the officers first that it was a bag of cement; that they later said that the bag was examined and found to contain approximately $600 in coins and bills, that it is sufficient to go to the jury in the case."

The prosecutor argued that Thorpe was aiding and abetting because of his mere presence in the premises for which the alleged search warrant was issued at the time the officers made the search, and his possession of some money. (R. 33.)

There is no indication in the record as to the reason the Motion for Judgment of Acquittal for Wyche was overruled.

The evidence failed to show that Thorpe did anything except to be merely present at the scene of an alleged offense, and the Court should have granted his motion for

Judgment of Acquittal. The testimony fails to show that Wyche was present at the scene of the alleged offense, but merely shows that he entered the premises after the alleged commission of an offense.

There is no evidence in this case tending to show that either petitioner was present at the scene of the alleged offense advising, inciting, or conniving at the offense, or aiding or abetting Reed or Porter. To be present at a crime is not evidence of guilt as an aider or abettor. *Hicks* v. *U. S.*, 150 U. S. 442, 447, 450; *U. S.* v. *DiRe* (*supra*); *U. S.* v. *Williams*, decided by the United States Supreme Court April 12, 1951; 12 ALR 279. Aiding and abetting means to assist the perpetrator of the crime (*U. S.* v. *Williams, supra*) and there is no testimony that either petitioner assisted Reed or Porter, or in fact, each other.

The Court's charge to the jury substantially and prejudicially failed to define joint enterprise, which, as indicated above, was the only theory upon which the petitioners were, or legally could be indicted and convicted as joint offenders. This constituted plain error affecting the substantial rights of the petitioners.

Prior to charging the jury, the Court asked counsel for the prosecution and the defendant if they requested any special charge (R. 32), and they stated no, and the prosecution asked for the usual charge.

The Court failed further to instruct the jury that before petitioners could be convicted, the jury had to believe beyond a reasonable doubt that each advised, incited, or connived at the alleged offense, or aided or abetted the principal offender in order to make them accomplices to the crime alleged in the indictment.

The trial court elected to charge the jury in its own language; and on the question of whether or not the petitioners and the other defendants, or any of them, were

accomplices or joint offenders, instructed the jury as follows:

> "I should first of all explain to you that the relationship of these people to each other in the eyes of the law is that of accomplices. I say that because the law provides that regardless of the degree of guilt which exists between any defendants, if they all operate together in a mutual undertaking or a joint enterprise, each one is equally guilty with the others for the conduct of any one." (R. 39.)

This instruction to the jury regarding accomplices was an expression by the Court of its judgment that the petitioners were guilty upon the ultimate issues and guilty under the indictment. The petitioners and other defendants were tried as joint offenders upon a single indictment, and the instruction they were accomplices was a judgment by the Court upon an ultimate issue which had to be passed on by the jury. This was a question of fact to be determined by the jury only. The clear effect of this instruction was to inform the jury that, in the Court's judgment, the testimony of the witnesses for the prosecution in fact did establish the guilt of the petitioners. The expression of such an opinion goes beyond the privilege of a judge to comment fairly on the facts. This charge was an expression of the Court's opinion upon an ultimate issue determinative of guilt or innocence. In this regard, see *United Brotherhood* vs. *U. S.*, 330 U. S. 395, 408, 409, wherein this Court, in ruling that a failure to charge correctly in a prosecution for conspiring to restrain interstate commerce is not harmless where the verdict of guilty may have resulted from incorrect instruction, said:

> "No matter how strong the evidence may be of an association's or organization's participation through its agents in the conspiracy, there must be a charge to the jury setting out correctly the limited liability under

> Section 6 of such association or organization for acts of its agents. *For a judge may not direct a verdict of guilty no matter how conclusive the evidence.* There is no way of knowing here whether the jury's verdict was based on facts within the condemned instructions, * * * *A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction.* (Italics supplied)

Also, in *Screws* vs. *U. S., supra,* this Court said:

> "And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

See also *Sullivan* v. *U. S.*, 85 U. S. App. D. C., 409, 411, 178 F. 2d 723; *Billeci* vs. *U. S.*, 87 U. S. App. D. C. 274; 184 F. (2d) 394, and cases cited therein; *Tatum* v. *U. S.*, decided by the United States Court of Appeals for the District of Columbia May 5, 1951; *Williams* v. *U. S.*, 76 U. S. App. D. C. 299, 131 F. (2d) 21-23; *McAfee* v. *U. S.*, 70 App. D. C. 142, 105 F. 2d 21.

It might be argued by the respondent that trial counsel for the petitioners took no exception to the charge as given, and that therefore they should not now be noticed. Attention is called to Rule 52 (b) of the Federal Rules of Criminal Procedure, which states as follows:

> "Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the Court."

The above rule is merely a restatement of the law that existed prior to the adoption of the Rules, and as held in a

long line of decisions, both before and after the effective date of the Rules. In a criminal case it is the duty of the trial court to correctly instruct the jury on all essential questions of law and the elements of the offense, whether requested or not. *Kreiner* v. *U. S.*, 11 F. (2d) 722, 731; *Kinard* v. *U. S.*, App. D. C., 96 F. (2d) 522, 524; *U. S.* v. *Levy*, 153 F. (2d) 995, 998; *U. S.* v. *Max.*, 156 F. (2d) 13; *Morris* v. *U. S.*, 156 F. (2d) 525, 527; *Samuel* v. *U. S.*, 169 F. (2d) 787, 792.

In cases where life or liberty is at stake, appellate courts will notice and correct a serious error plainly prejudicial to the rights of the defendant where no action has been taken. *Wiborg* v. *U. S.*, 163 U. S. 632, 659; *Clyatt* v. *U. S.*, 197 U. S. 207, 222; *Weems* v. *U. S.*, 217 U. S. 349, 362; *Brasfield* v. *U. S.*, 272 U. S. 448, 450; *Screws* v. *U. S.*, 325 U. S. 91, 107; *United Brother., etc.* v. *U. S.*, 330 U. S. 395, 411; *Lamento* v. *U. S.*, 4 F. (2d) 901; *Van Gorder* v. *U. S.*, 21 F. (2d) 939, 942; *Bogileno* v. *U. S.*, 38 F. (2d) 584, 587; *Strader* v. *U. S.*, 72 F. (2d) 589, 593; *Miller* v. *U. S.*, 120 F. (2d) 968, 972; *Williams* v. *U. S.*, App. D. C. 131 F. (2d) 21-23; *U. S.* v. *Levy, supra; U. S.* v. *Monroe*, 164 F. (2d) 471, 474; *U. S.* v. *Perplies*, 165 F. (2d) 874, 875, 876.

And where the error is so fundamental as to fail to submit the essential ingredients of the offense to the jury, the reviewing court will take note of it on its own motion. *Screws* v. *U. S., supra*; *Blodgett* v. *U. S.*, 161 F. (2d) 47, 52; *U. S.* v. *Perplies, supra*; *U. S.* v. *Capitol Meats*, 166 F. (2d) 537, 538.

It must be remembered that petitioners were convicted and sentenced for a felony, one petitioner being sentenced to serve the maximum penalty of three years. This is, then, such a case in which this Court should notice plain error affecting their substantial rights. It has often been argued by the prosecution that the noticing of plain error affecting

substantial rights has been limited to capital cases. This is not correct. Appellate courts should without doubt take pains in a capital case to see that the defendant has been accorded all of the rights given him by law. But the same care is to be taken in cases involving liberty. *Screws* v. *U. S., supra.*

It is clear that there existed plain errors and defects affecting substantial rights in the trial court's charge to the jury, wherein it charged that the petitioners and other defendants were accomplices—the ultimate issues for the jury to determine under the indictment—and the failure of the trial court to define joint enterprise—both of which are essential questions of law involved in the case and essential elements of the offense.

The Circuit of appeals in deciding the case at bar stated that since petitioners did not comply with the provisions of Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. Code, the petitioners are not allowed to raise their objection for the first time upon appeal. As has been shown, this holding fails to give proper effect to applicable decisions of this Court, and is in conflict with its own and other Circuit courts of appeals decisions. The Circuit court cites as its authority for its holding the case of *Villaroman* v. *U. S.*, 87 App. D. C. 240; 184 F. (2d) 261.

It should be noted that in *Villaroman, supra*, no plain error or defect affecting substantial rights was involved in that decision on this point, and was dicta. It should further be noted that in many of the cases cited, appellate counsel failed to bring the plain error to the attention of the appellate court, and the appellate court itself noticed the plain errors; whereas, in the case at bar, the plain errors and defects affecting substantial rights were brought to the attention of the appellate court by counsel.

The errors complained of in the instructions and the failure to charge on essential elements of the offense are so

fundamental and basic that they operated to deprive the petitioners of a fair and impartial trial. *Screws* v. *U. S., supra.* It is submitted that there existed plain errors and defects affecting substantial rights in this case which involved a serious criminal offense, and the errors were substantial and plainly prejudicial to petitioners whose liberties are involved. It is further submitted that the trial court's charge to the jury on the essential questions of law involved in the case, whether requested or not, did clearly affect the substantial rights of the petitioners within the meaning of Rule 52 (b) and should have been noticed by the Circuit court, which should have reversed the judgment of the District court.

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 515

ANNIS WYCHE AND ROBERT C. THORPE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority and concurring opinions of the Court of Appeals (R. 50-52) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1951 (R. 53). On December 19, 1951, the time for filing a petition for a writ of certiorari was extended to January 8, 1952, by order of the Chief Justice (R. 55). The petition

was filed January 7, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether there was probable cause for the issuance of a search warrant.

2. Whether there was probable cause for the arrest of petitioners who were in the premises at the time of the execution of the search warrant by officers.

3. Whether the court's charge to the jury, to which defense counsel made no exception, constituted reversible error.

4. Whether the evidence was sufficient to support the convictions.

STATUTES INVOLVED

22 D.C. Code (1940 ed.) 1501 provides:

> If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery, or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lot-

tery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, she shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, sec. 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, sec. 1).

22 D.C. Code (1940 ed.) 1502 provides:

If any person shall within the District have in his possession, knowingly, any ticket, certificate, bill, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for the purpose of playing, carrying on, or conducting any lottery, or the game or device commonly known as policy lottery or policy, he shall be fined upon conviction of each said offense not more than $500 or be imprisoned for not more than six months, or both. (Apr. 5, 1938, 52 Stat. 198, ch. 72, sec. 2).

STATEMENT

On August 1, 1950, a two-count indictment (R. 1) was filed against the petitioners and two others, charging (1) the carrying on of a numbers game in violation of 22 D.C. Code (1940 ed.) 1501, *supra*, and (2) possession of numbers slips in violation of 22 D.C. Code (1940 ed.) 1502, *supra*. After a jury trial, all four defendants were convicted on both counts. Petitioner Wyche was sentenced to concurrent terms of imprisonment for six to eighteen months on the first count and six months on the second count. Petitioner Thorpe was sentenced to concurrent terms of imprisonment for nine to thirty-six months on the first count, and six months on the second count. (R. 50-51.)[1] On appeals taken by petitioners their convictions were affirmed by the court below (R. 50-52).

The Government's uncontroverted evidence may be summarized as follows:

On May 19, 1950, two police officers and an informant, Irma Young, appeared before the United States Commissioner and executed affidavits to the effect that they had good cause to believe that the first floor of the premises at 39 Massachusetts Avenue, N.W., in the District of Columbia, and an adjacent one-story building, No. 39½, were being used as a numbers turn-in place. The affidavit of

[1] The other defendants, Reed and Porter, were given suspended sentences of from six to eighteen months and were placed on probation. They did not appeal from the conviction (Pet. 7).

the officers stated that, having reliable information that the premises were being used for such purpose, they observed 20 men and women entering the premises between 1:00 p.m. and 2:20 p.m. on May 16. Similarly on May 17 and 18 they saw about 18 men and women enter the premises. For the most part, the same people appeared on each of the three days, and when entering they had paper bags or bulging pockets which the officers had reason to believe contained numbers slips. After entering No. 39 these persons went through the front room into No. 39½, remained a few minutes, and then came away empty-handed. The affidavit concluded with the statement that these facts were substantiated by Irma Young who had formerly resided at No. 39. (R. 46-47.) The affidavit of Irma Young recites various facts showing her personal knowledge of the fact that No. 39½ was a "numbers place", derived from having lived at No. 39, having observed numbers slips being turned in and taken away, and having placed numbers bets herself (R. 47). On the basis of these affidavits the Commissioner issued a search warrant for the first floor of No. 39 and for No. 39½, directing the seizure of any tickets, books, papers, memoranda or devices used in promoting the numbers game (R. 44-45).

The two police officers testified that on that same day, at 2:00 p.m., they went to the premises at No. 39 Massachusetts Avenue, N.W., with the search

warrant (R. 5, 23), and entered the house through a back door (R. 8, 23). They observed 12 or 14 persons in the room. Thorpe was the closest to the officers and they observed that he had a large paper bag in his hand. Wilhelmina Porter was seated at a table or desk in the middle of the floor behind an adding machine. (R. 8-9, 23.) On desks in the room, there were two adding machines, money, envelopes, numbers slips and a telephone. More money and slips were found in the desk drawers. (R. 9.) On the floor along the wall, where several people had been standing when the officers first entered the room, they found numbers books from which slips had been torn, and adding machine tape, such as a turn-in person receives to account for amounts turned in (R. 17).

Also found in the house were more numbers turn-in slips, another adding machine, adding machine tape, more money, envelopes, and a telephone (R. 9, 15-16, 17-18, 45).

The officers asked Thorpe what he had in the bag that he was holding and he replied that it was cement. Officer Pizzata looked in the bag and found about $600 in rolls of coins and one dollar bills. (R. 8, 13, 23-24.) Thorpe told the officers that he had just come by a few minutes before and "I'd have been gone in another two minutes. I'd have been gone. Just came by to pick up some money." (R. 14, 24.)

About five minutes after the officers entered the room, Wyche walked in through the rear door (R.

9). He was searched and seven envelopes containing numbers slips were taken from his coat pocket, and money in the amount of $98 in small bills and about $18 in pennies, nickels, dimes, and quarters, were taken from his trouser pockets (R. 11, 14-15). A notebook was found in his inside coat pocket (R. 15).

Petitioners made no motion to suppress the evidence before trial. At the trial, when counsel learned that the government did not intend to call Irma Young as a witness, counsel argued that defendants had a right to be faced with the person on whose affidavit the warrant was issued (R. 2). The court observed that his objection went to the sufficiency of the Government's evidence and should more properly be raised after the Government had put in its case (R. 2-3).

As soon as the Government's first witness, Officer Bean, testified that he had a search warrant when he entered the premises involved, defense counsel again objected on the ground that the affidavits on which the warrant was issued must be proved, and that the affidavit of the two officers was insufficient in itself to justify the issuance of the warrant (R. 6). Defense counsel stated that he was not making a motion to suppress evidence [2] but

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[2] In fact defense counsel gave as the reason why he did not make such a motion, the fact that, under *Gibson* v. *United States*, 149 F. 2d 381 (C.A. D.C.), certiorari denied *sub. nom. O'Kelley* v. *United States*, 326 U.S. 724, the movant must show some property right in the premises or the thing seized. He asserted that he was making no such claim. (R. 7-8.)

merely attacking the legality of the search warrant because of the absence of the affiant Irma Young from the courtroom. The court overruled the objection (R. 6-8).

At the close of the Government's case, defense counsel again made a "general objection with respect to the warrant" (R. 26), and an objection to the evidence obtained from Wyche and Thorpe (R. 26-27). Both objections were overruled by the court on the ground that the search was made incident to execution of a valid search of the premises. On the question of legality of the warrant, the trial court held that the affidavit of the two police officers based on hours of observation of the premises over the course of three days is (R. 28) "sufficient justification in affidavit form for a search warrant without reference to the last paragraph, which says they have further substantiation made by the affidavit of Irma Young, and so forth."

ARGUMENT

1. Petitioner's attack on the validity of the search under the warrant is without merit. It is clear, as defense counsel conceded at the trial (R. 6) that the affidavits of the police officer and Irma Young established probable cause for the issuance of the warrant. In view of the fact that trial counsel disclaimed any intention to make a motion to suppress the evidence, it was unnecessary for the government to produce Irma Young as a witness.[3]

[3] Under the circumstances, it is unnecessary to consider whether petitioner's failure to file a motion to suppress under

In any event, as the district court ruled, the personal observations by the officers showed circumstances sufficient to give rise to a reasonable belief that a crime was being committed on the premises, and, thus, their affidavit in itself showed probable cause for the warrant. *Dumbra* v. *United States,* 268 U.S. 435, 441; *Brinegar* v. *United States,* 338 U.S. 160, 175-176; *Seymour* v. *United States,* 177 F. 2d 732 (C.A. D.C.).

2. Petitioners also contend that their arrest, and the search of their persons incident thereto was illegal. However, an officer of the District of Columbia may lawfully arrest without warrant persons who he has probable cause to believe have committed a felony. *Newyahr* v. *United States,* 177 F. 2d 658 (C.A. D.C.), certiorari denied, 338 U.S. 936; *Maghan* v. *Jerome,* 88 F. 2d 1001, 1002 (C.A. D.C.). Here, in a secret hideout for illegal activities, the officers found petitioner Thorpe with a bag in his hand of the type commonly used in bringing in the fruits of that illegal activity. While they were there, petitioner Wyche entered through the rear door, showing familiarity with the enterprise. As the court below held, the officers

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Rule 41(e) deprived them of standing to raise the issue at this time. It is evident from the circumstances set forth in the Statement, supra, pp. 7-8, that trial counsel tried to get the benefits of a motion to suppress without denominating it as such, because he was unwilling to assert on behalf of his clients any proprietory interest in either the premises searched or the property seized. Under such circumstances, the majority of the court below was correct in holding that petitioners cannot be deemed to have made a motion to suppress.

clearly had reason to believe that petitioners were participants in the illegal venture. *Beard* v. *United States,* 82 F. 2d 837, 844 (C.A. D.C.), certiorari denied, 298 U.S. 655.

3. Petitioners object (Pet. 29-34) to the court's statement in its charge (R. 39) that:

> I should first of all explain to you that the relationship of these people to each other in the eyes of the law is that of accomplices. I say that because the law provides that regardless of the degree of guilt which exists between any defendants, if they all operate together in a mutual undertaking or a joint enterprise, each one is equally guilty with the others for the conduct of any one.

They argue that this constitutes an expression of opinion as to guilt. A reading of the full charge refutes such contention. The court fully instructed the jury on the burden of proof factor, the definition of proof beyond a reasonable doubt, and the role of a jury in weighing the evidence. Manifestly the jury could not have been misled by this instruction.

Moreover, at the trial, defense counsel failed to request any special instruction before the charge to the jury was given (R. 32), and after the charge, defense counsel stated that he had no further request for any instruction, and took no exception to the instructions as given (R. 43). This non-compliance with Rule 30 of the Federal Rules of Criminal Procedure precludes the consideration of such

objections for the first time on appeal since there is clearly no plain error affecting substantial rights. *Villaroman* v. *United States*, 184 F. 2d 261, 262 (C.A. D.C.).

4. Petitioners erroneously assume (Pet. 27-29) that they could be found guilty only on the theory that they aided and abetted Reed and Porter in the commission of the crimes charged, and argue that there is no evidence of a common intent in furtherance of a previously formed common design. Their assumption is incorrect. Each petitioner was charged as a principal, and there is substantial evidence to support the conviction of each petitioner individually. Each was found in a numbers establishment in possession of the impedimenta of that illicit trade under circumstances which justify the conclusion that each was engaged in the business there being conducted. Cf. *Beard* v. *United States*, *supra* (82 F. 2d at p. 844). Moreover, the collocation of circumstances clearly establishes a common design to commit the offense charged, and establishes the fact that both petitioners, together with Reed and Porter, were participants in a joint criminal venture.

CONCLUSION

The decision below is correct and no conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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